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Supreme Court, U.S.
FILED
JUL 21 1986
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CLERK

No. 85-1813

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

CITY OF RENSSELAER, NEW YORK, POLICE CHIEF JAMES STARK, POLICE OFFICER EDWARD MEYER, and POLICE OFFICER KEVIN HARRINGTON,

Petitioners,

v.

MARY C. FIACCO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION TO PROCEED IN FORMA PAUPERIS and RESPONSE TO PETITION FOR CERTIORARI

DONALD J. SHANLEY, ESQ.
Attorney for Respondent
SHANLEY & SHANLEY, ESQS.
35 First Street
Troy, New York 12180
(518) 274-1314

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In The
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v. No. 85-1813

MARY C. FIACCO,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, MARY C. FIACCO, by and through her attorney, DONALD J. SHANLEY, ESQ., moves for leave to file the attached Response to Petition for Certiorari, without prepayment of fees or costs or giving security therefor, and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court and 28 U.S.C. Section 1915 and in support thereof submits the annexed affidavit.

Leave to proceed in forma pauperis was sought and obtained in the United States District Court for the Northern District of New York.

DATED: July 24, 1986

Donald J. Shanley

DONALD J. SHANLEY, ESQ.
Attorney for Respondent
SHANLEY & SHANLEY, ESQS.
35 First Street
Troy, New York 12180
(518) 274-1314

In The
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CITY OF RENSSELAER, NEW YORK,
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v. No. 85-1813

MARY C. FIACCO,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
COUNTY OF RENSSELAER) SS.:
CITY OF RENSSELAER)

I, MARY C. FIACCO, being duly sworn, depose and say that I am the respondent in the above-entitled case, that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last

employment and the amount of the salary and wages per month which you received. In 1975 I was employed by Arthur Treacher earning $39.00 per week.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? Yes

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. Public Assistance: Cash (ADC) . . . $3,600.00 Food stamps . . . 1,560.00 $5,160.00

3. Do you own any cash or checking or savings account? No

   a. If the answer is yes, state the total value of the items owned.

3. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? No

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. Jamie Michael Fiacco, son

I understand that a false statement or answer to any questions in this affidavit will subject me to the penalties of perjury.

Mary C Fiacco
MARY C. FIACCO

Sworn to before me this
14th day of July, 1986

Robert W. Redmond
NOTARY PUBLIC ROBERT W. REDMOND
Notary Public, State of New York
Qualified in Saratoga County
My Commission Expires March 30, 1988
July 31, 1988

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Petitioners' Appendix C) is reported at 783 F. 2d 319.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTORY PROVISION

The applicable statutory provision, 42 U.S.C. Section 1983, is also adequately set forth in the Petition.

STATEMENT OF THE CASE

The facts of the case, including the conflicting versions of events presented by the parties hereto upon which the respondent's claims under the aforesaid statutory provision are based, are set forth in the opinion of the Court of Appeals (Petitioners' Appendix C at pages 4c through 13c).

ARGUMENT

As is usually the case in an action brought under 42 U.S.C. Section 1983 based upon the use of excessive force during the course of an arrest, two substantially differing versions of what transpired during the early morning hours of April 4, 1981, were presented to the jury. At the close of the evidence in the first portion of the case against the individual police officers, and in response to special interrogatories submitted without objection, the jury found that each officer had (1) deprived Fiacco of her federal constitutional rights, (2) negligently injured her, in violation of state law, and (3) negligently failed to provide her with medical attention, in violation of state law. The jury found that neither officer had assaulted Fiacco "maliciously and wantonly" in violation of state law, and as to each claim of negligence sustained, it found that Fiacco had negligently contributed to her own injuries (Petitioners' Appendix C at page 8c).

It was within the province of the jury as the triers of fact to determine which of the two conflicting versions of the facts

presented, or which portions thereof, to believe.

At the conclusion of the proof during the second portion of the case involving Fiacco's claims against the city defendants, and in response to special interrogatories again submitted without objection, the jury found that these defendants had (1) "[e]ngaged in a course of conduct or had a policy of deliberate indifference to the supervision of the defendant police officers which proximately resulted in the deprivation of...Fiacco's right to wit: not to be punished or not to have excessive force used against her during her arrest or detention without due process of law in violation of her constitutional right under the 5th and 14th Amendments and pursuant to Title 42 Section 1983" and (2) "[n]egligently failed to supervise [the officers] which negligent supervision was a proximate cause of the injuries sustained by...Fiacco" (Petitioners' Appendix C at page 10c).

As set forth in the opinion of the Court of Appeals (Petitioners' Exhibit C at pages 21c through 29c), the evidence presented against the city defendants was sufficient as a matter of law to permit a rational juror to find that these defendants had a policy of nonsupervision of police officers that amounted to a deliberate indifference to their use of excessive force.

Special interrogatories were also presented to the jury, again without objection, on the issue of damages. After receiving instructions from the trial court, to which no exception was taken, that "there will be possibly different amounts of

damages [that] could be awarded with reference to the federal claim as with reference to the state claims," and that in assessing the injury flowing from the constitutional deprivation, the jury might "wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, and the significance of the right in the context of activities which the Plaintiff was engaged in at the time of the violation of the right" (Petitioners' Appendix C at pages 30c through 31c), the jury awarded to Fiacco as against all defendants the sum of $75,000.00 on her constitutional claims (later reduced to $25,000.00 by remittitur) and the sum of $1,000.00 on her negligence claims, reduced to the extent of her own contributory negligence (15%).

In Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962), this Court held that "[w] here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." The alleged inconsistency in the award of damages to Fiacco on her respective federal and state claims has been adequately reconciled by the Court of Appeals in its opinion (Petitioners' Exhibit C at pages 30c through 31c).

Thus, in its simplest form, this case involved questions of fact which were for the triers of fact to resolve. The defendants, having failed to object to the various sets of special interrogatories submitted to the jury or to take exception from

any part of the trial court's instructions, cannot now be heard to complain of the verdict rendered against them. They had their day in court, and they were found wanting in their actions.

Furthermore, the reliance by the city defendants upon City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985) to show that the decision below conflicts with the decisions of this Court is totally misplaced. As noted by the Court of Appeals, Fiacco's theory of liability as against these defendants on her constitutional claim was not that the City intended to engage in unintentional conduct, but rather, that "the City was knowingly and deliberately indifferent to the possibility that its police officers were wont to use excessive force and that this indifference was demonstrated by the failure of the city defendants to exercise reasonable care in investigating claims of police brutality in order to supervise the officers in the proper use of force." (Petitioners' Appendix C at page 16c). The plurality opinion in Tuttle was based upon an erroneous instruction to the jury that the existence of a policy of inadequate training of police officers could be inferred from a single incident of excessive force. In the instant case, a continuing police of indifference was clearly established by the proof adduced at trial. As this Court noted in Bertold J. Pembaur v. City of Cincinnati et al., 89 L. Ed. 2d 452, 462 n.6 (1986) [citing Tuttle], once a municipal policy is established, "it requires only one application...to satisfy fully Monell's requirement

that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy."

Finally, the contention that the actions of the police officers did not rise to the level of a constitutional tort is wholly without merit. As sworn public servants charged with the duty of preserving the law, they were certainly on notice that the use of excessive force in the course of an arrest and detention could, and in this instance did, cause the injuries complained of by Fiacco. Because of their positions as police officers, and upon ascertaining that Fiacco was intoxicated, it was incumbent upon these petitioners to exercise a higher degree of care in their treatment of the respondent. The evidence, however, is quite to the contrary.

It matters not that the jury absolved the officers on the claim that they had maliciously and wantonly assaulted Fiacco. The jury was entitled to find, based upon the instructions of the trial court, that the officers had committed the acts alleged, that the force used was excessive, and that they knew or reasonably should have known that their actions would violate Fiacco's clearly established constitutional rights (Petitioners' Exhibit C at page 14c).

CONCLUSION

For the reasons set forth above, the petition for

certiorari should be denied.

DATED: July 24, 1986

Donald J. Shanley, Esq.
Attorney for Respondent
SHANLEY & SHANLEY
35 First Street
Troy, New York 12180
Tel. No. 518/274-1314